U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 04 April 2006

CASE NO.: 2005-BLA-06045

In the Matter of

ROBERT O. HOOD,
Claimant

v.

JIM WALTER RESOURCES, INC.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Patrick K. Nakamura
For the Claimant

Thomas J. Skinner IV
For the Employer

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under 30 U.S.C. §§901-945 (the Act). In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing. Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment, and it is commonly known as black lung.

A formal hearing was held before me in Birmingham, Alabama on February 14, 2006. At this time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the regulations issued thereunder, found in Title 20 of the Code of Federal Regulations. The record was left open after the hearing to permit the parties to submit post-hearing briefs. The Claimant and the Employer submitted briefs.

PROCEDURAL HISTORY

Claimant has filed for benefits under the Act two times prior to the current claim; both claims, filed on August 19, 1994 and September 13, 2000, were denied by the Director. (D.X. 1, 2)[1]. The latter claim was denied on December 20, 2000. Claimant filed his current claim on September 30, 2004. (D.X. 4). The District Director issued a Proposed Decision and Order denying benefits to the Claimant on May 5, 2005. The Claimant appealed the Proposed Decision and requested a hearing before an administrative law judge. The hearing was held before me on February 14, 2006 in Birmingham, Alabama.

STIPULATIONS

The parties stipulated that Claimant has a 24.5 year history of coal mine employment.

ISSUES

(1) Whether Claimant has pneumoconiosis,

(2) Whether Claimant's pneumoconiosis arose out of his coal mine employment, and

(3) Whether Claimant is totally disabled due to pneumoconiosis.

SUMMARY OF THE EVIDENCE

Robert O. Hood, Claimant, has a coal mining employment history of 24.5 years. (T 5). He began coal mining on March 10, 1975 for Jim Walter Resources, Inc., where he worked until 1999. (T 7). Most of his career Claimant was an inside belt man, a coal miner who changes rollers and keeps the conveyor belt clean as it transports coal out of the mine. (T 8-9). In his last three years of employment, Claimant was in charge of watching the main belt, which was experiencing problems. (T 9). Claimant often would have to change rollers by himself. (T 10). The rollers, which allowed the belt to convey the coal, were made of steel and weighed between 50-75 pounds. (T 12). Claimant would change them by himself when no one was around, retrieving spare rollers from 60 or more feet away, carrying them on his shoulder to the belt. (T 13). Changing the roller required use of a screwdriver, come-alongs, and a 16 pound sledgehammer. (T 14). Claimant replaced four to five rollers a day. (T 14).

[1] The following abbreviations are used throughout: T refers to the hearing transcript, CX refers to the Claimant's exhibits, EX refers to the Employer's exhibits, and DX refers to the Director's exhibits.

Claimant's other duties in maintaining the belt included shoveling under the rollers and carrying approximately 20 bags, each weighing 50 pounds, of rock dust each day. (T 14-16). His job also involved climbing and crawling. (T 17). Claimant testified that there were dusty conditions all the time, sometimes so dusty as to limit sight to fifteen feet. (T 10). Claimant also testified that he has trouble breathing, and experienced this trouble while testifying. Claimant feels he could not perform this job today because he can not breathe while bent over, a position that the job requires. (T 19-20).

Claimant currently takes Flomax, prescribed by Dr. Livingston, for his breathing problems. (T 21-22). He takes this as needed. (T 22). Claimant testified that he smoked a half-pack a day of cigarettes from his teenage years until approximately 2000. (T 22-23). Claimant also takes blood thinners for a cardiac condition and medication for a back injury sustained while working in the mine. (T 25). Claimant has been diagnosed with asbestosis. (T 23).

New evidence before this Court includes two chest x-rays and their readings (CX 1, EX 1, DX 13-16), two pulmonary function tests (DX 13,14), two arterial blood gas studies (DX 13, 14), and three medical opinions (EX 2, DX 13,14).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Entitlement to benefits under 20 C.F.R. §718 depends upon proof of three elements. The claimant must establish he has pneumoconiosis, his pneumoconiosis arose out of his coal mine employment, and he is totally disabled due to his pneumoconiosis.

Section 7(c) of the Administrative Procedure Act imposes the burden of persuasion on the party seeking the rule, in this case, Claimant. Section 7(c) also requires a claimant to meet his burden by a preponderance of the evidence, not by clear and convincing evidence. Accordingly, if the evidence is evenly balanced, Claimant must lose. Director, OWCP v. Greenwich Collieries, 512 U.S.267 (1994).

(1) Whether Claimant has pneumoconiosis

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to §718.202, the claimant can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in §§718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Chest X-ray Evidence

Under §718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with §718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories

0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

Chest x-ray interpretations, relevant to the determination of whether Claimant has pneumoconiosis, were submitted into evidence. The following is a list of admissible x-ray readings and the names and qualifications of the interpreting physicians.

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASS
10/29/04	11/02/04	D.X. 13	Dr. Nath	BCR, B	Pneumoconiosis 1/0
10/29/04	1/19/05	D.X. 15(R)	Dr. Wiot	BCR, B	Negative
10/29/04	2/10/05	D.X. 16 (R)	Dr. Cappiello	BCR, B	Pneumoconiosis 1/0
1/11/05	9/2/05	E.X. 1	Dr. Wheeler	BCR, B	Negative
1/11/05	4/7/05	C.X. 1	Dr. Ahmed	BCR, B	Film overexposed
1/11/05	1/11/05	D.X. 14	Dr. Hasson		Negative

Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). The administrative law judge may assign more weight to the x-ray interpretation of a B-reader. Aimone v. Morrison Knudson Co., 8 BLR 1-32 (1985); Vance v. Eastern Associated Coal Corp., 8 BLR 1-69 (1985). The Benefits Review Board held the interpretation of an x-ray by a physician who is a board-certified radiologist as well as a B-reader may be given more weight than the interpretation of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 BLR 1-128 (1984). Where there is conflict among x-ray interpretations, for example, when the interpretations of two B-readers conflict, the administrative law judge, as the trier of fact, must resolve it. Dees v. Peabody Coal Co., 5 BLR 1-117 (1982); Elkins v. Beth Elkorn Corp., 2 BLR 1-683 (1982).

Claimant has submitted two new chest x-rays, taken on October 29, 2004 and November 11, 2005. Dr. Nath and Dr. Cappiello found the October 29, 2004 x-ray to be positive for pneumoconiosis, while Dr. Wiot found it to be negative. All three physicians are board certified B-readers. There are two negative readings of the November 11, 2005 x-ray, and one reading stating the film was overexposed and not readable as such. Of the two negative readings, Dr. Hasson's reading will be given little weight because he is neither a board certified radiologist nor a B-reader. Left are the opinions of two dually qualified physicians, Dr. Wheeler and Dr. Ahmed. Dr. Ahmed concluded that the film was not optimal for evaluating small pneumoconiotic opacities, and marked the x-ray as "overexposed". For that reason, the negative reading of this film by Dr. Wheeler is accorded less weight. Due to the two positive readings for pneumoconiosis on the October 29, 2004 chest x-ray and the qualifications of the readers, I find that the Claimant has established the presence of pneumoconiosis by x-ray evidence.

This conclusion takes this claim out of the realm of § 725.309(d), which states that subsequent claims (those claims filed more than one year after the effective date of a final order denying a previous claim) shall be denied absent a showing of a change in condition. Here, Claimant's chest x-rays evidence pneumoconiosis, which was not proven in his prior claims, and therefore there has been a change in condition.

(2) Pneumoconiosis arising out of coal mine employment

In order to establish entitlement to black lung benefits, Claimant must also show that his pneumoconiosis arose out of coal mine employment. The regulations provide that a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). However, where a miner has established less than ten years of coal mine employment history, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." § 718.203(c).

As Claimant has established pneumoconiosis under Section 718.202(a), he is entitled to the presumption set forth in Section 718.203(b). The parties have stipulated to a coal mining history of 24.5 years. Employer has not offered evidence to rebut this presumption, and therefore Claimant has established that his pneumoconiosis arose out of coal mine employment.

(3) Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant

to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

Claimant must establish that his total disability is due to pneumoconiosis. This element of entitlement is established if pneumoconiosis, as defined in Section 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Section 718.204(c)(1); Bonessa v. United States Steel Corp., 884 F.2d 726 (3d Cir. 1989).

Pulmonary Function Tests

In order to establish total disability through pulmonary function tests, the FEV_1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC tests. § 718.204(b)(2)(i)(A-C). Such studies are designated as "qualifying" under the regulations. Assessment of pulmonary function study results is dependent on Claimant's height, which was most frequently noted to be 71 inches. I therefore used that height in evaluating the studies. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

The current record contains the pulmonary function studies summarized below.

DATE	EX. NO.	PHYSICIAN	AGE/HEIGHT	FEV_1	FVC	MVV	FEV_1/FVC	QUALIFIES	VALID
10/29/2004	D.X. 13	Dr. Khan	63/70.0	2.07	2.76	72	75%	NO	
1/11/05	D.X. 14	Dr. Hasson	63/71.0	1.70	2.22	38	77%	YES	Not validated

Pulmonary function tests are effort dependent and it is generally accepted that spuriously low values are possible but spuriously high values are not. See Andruscavage v. Director, OWCP, No. 93-3291, slip op. at 9-10 (3d Cir., February 22, 1994) ("medical literature supports ... the conclusion that [pulmonary function studies] which return disparately higher values tend to be more reliable indicators of an individual's respiratory capacity than those with lower values").

Here, there is one qualifying PFT and one non-qualifying PFT. If there was a considerable amount of time between the non-qualifying and the qualifying studies then one might consider the later evidence rule. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989 en banc); Casella v. Kaiser Steel Corp., 9 B.L.R. 1-131 (1986). But considering that there is a disparity in numbers obtained with only a four month time difference, and that the study is effort dependent, I find that the numbers obtained by Dr. Khan are the most accurate. As stated above, spuriously low values can be manufactured, while high values can not. Additionally, the results of this test have not been validated.

Accordingly, Claimant has failed to establish total disability due to pneumoconiosis on the basis of pulmonary function tests.

Arterial Blood Gas Studies

The current record contains the arterial blood gas studies summarized below.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
10/29/04	D.X. 13	Dr. Khan	34.3 36.5*	82.4 87.7*	NO
1/11/05	D.X. 14	Dr. Hasson	38.2	72.7	NO

* after exercise

Neither test produced qualifying results as set forth in Appendix C to Part 718. Therefore, I find that the Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Cor Pulmonale

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, total disability has not been established pursuant to 20 C.F.R. § 718.204(b)(2)(iii).

Medical Opinion

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv).

An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis).

The record contains three medical opinions, two submitted by the Director and one by the Employer- no medical opinions were submitted by Claimant. (D.X. 13, 14 and EX 2). Dr. Hasson and Dr. Renn's opinions carry less weight, since neither doctor found either clinical or legal pneumoconiosis, which is contrary to my findings. In Toler v. Eastern Assoc. Coal Co., 43 F.2d 109 (4th Cir. 1995), the Fourth Circuit held that the administrative law judge was correct in discounting the medical opinion of a physician who, contrary to the judge, found there was no

pneumoconiosis. However, in Hobbs v. Clinchfield Coal Co., 45 F.3d 819 (4th Cir. 1995), the court limited the finding in Toler to only cases where the physician found neither clinical nor legal pneumoconiosis as described in § 718.201 (2001). Legal pneumoconiosis is broader than clinical pneumoconiosis, and includes any chronic lung disease or impairment arising out of coal mine employment. 20 C.F.R. § 718.201(a)(2). Here, Dr. Hasson and Dr. Renn found no clinical or legal pneumoconiosis. Dr. Hasson found no evidence of pneumoconiosis at all, and stated that Claimant's shortness of breath was a result of bronchitis arising out of his smoking history. Dr. Renn found there was obstructive pulmonary disease, but that it did not arise out of coal mine employment.

Dr. Kahn conducted an independent examination and concluded that Claimant is totally disabled due primarily to his coal mining employment and smoking. Dr. Kahn found that Claimant did suffer from coal miner's pneumoconiosis based upon testing, Claimant's history and physical examination. Dr. Kahn lists coal dust inhalation, smoking and coronary artery disease as the etiology of Claimant's pulmonary disease. He concluded that Claimant is "significantly impaired" from performing his last coal mine employment.

Claimant is required to show that his pulmonary condition is a significant contributor to his disability, not that it is the only cause of his disability. Section 718.204(c)(1); Bonessa v. United States Steel Corp., 884 F.2d 726 (3d Cir. 1989). Claimant must show this by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987). Dr. Kahn's opinion, coupled with Dr. Renn's finding of obstructive pulmonary disease and Dr. Hasson's finding of asthmatic bronchitis, is enough to satisfy Claimant's burden under the Act. Accordingly, I find that Mr. Hood has shown total disability due to pneumoconiosis on the basis of medical opinion.

Entitlement

As Mr. Hood has established total disability due to pneumoconiosis, and thus is entitled to benefits under the Act.

Benefits are to be paid in monthly increments, beginning with the first month in which claimant satisfies all conditions of entitlement. 30 U.S.C. § 932(d); 20 C.F.R. § 725.203(a)(2000) and (2001). Claimant first satisfied all conditions of entitlement on October 29, 2004, when chest x-rays showed pneumoconiosis and Dr. Kahn determined he was totally disabled due to the disease.

ATTORNEY'S FEE

No award of an attorney's fee for services to Claimant is made herein because no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby granted to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. § 725.365 and § 725.320 of the regulations. A service sheet showing service has been made to all parties, including the Claimant, must accompany the application. Parties have ten (10) days following receipt of such application to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, the EMPLOYER shall:

(1) Pay ROBERT O. HOOD all benefits to which he is entitled under the Act commencing as of October 29, 2004.

(2) Pay Claimant's attorney, PATRICK K. NAKAMURA, ESQ., fees and expenses to be established in a supplemental decision and order.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).